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JAN 21 1984
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83-1227

NO. _____

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

OCTOBER TERM 1983

L. G. MOORE,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED
STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FOR L. G. MOORE

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QUESTIONS PRESENTED FOR REVIEW

1. Should the indictment have been dismissed or an acquittal ordered because federal jurisdiction, which enabled the Government to prosecute Petitioner under the Travel Act, was furnished solely by behavior of undercover agents?
2. Whether the Government's conduct was so egregious in luring Petitioner to commit bribery that an acquittal should have been ordered on the grounds of Due Process?
3. Whether the District Court violated Petitioner's rights under the Confrontation Clause in admitting inadmissible, tape-recorded, hearsay evidence?

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OPINIONS BELOW

The opinion of the Court of Appeals is officially reported at 716 F.2d 257 (5th Cir. 1983). There is no opinion of the District Court as such case was tried before a jury.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1983. A petition for rehearing was denied November 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

1. U.S. Const. amend. V
2. U.S. Const. amend. VI
3. 18 U.S.C. §1952

(See Appendix - Above is set out verbatim)

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

Defendants, L. G. Moore and John Garrett, were indicted in a four count indictment on May 26, 1981, in Houston, Texas for conspiracy to violate, and violating the Travel Act, 18 U.S.C. §1952. As a result of the aforesaid indictment, original jurisdiction existed with the District Court located in the Southern District of Texas, Houston Division. Defendants' trial to a jury began on January 12, 1982, and on February 25, 1982, the jury returned a guilty verdict against both Defendants on count three, a substantive Travel Act violation. The jury was unable to reach a decision on counts one and four. (The Defendants were not arraigned on the second count.) Both Defendants were sentenced to five years probation,

required to perform three hundred fifty hours of community service, and pay a Ten Thousand Dollar fine. Petitioner Moore timely appealed to the Fifth Circuit Court of Appeals. Moore's appeal was denied on September 19, 1983. He then timely filed a petition for rehearing which was subsequently denied on November 22, 1983.

(ii) Statement of Facts

On February 5, 1979, Joseph Hauser pleaded guilty to federal criminal charges arising from a scheme to swindle health, welfare, and pension funds from labor unions. See United States v. Hauser, No. CR-78-1313 (D. Ariz., 1979). At about the same time, Hauser willingly agreed to participate with F.B.I. agents in the undercover operation which has become commonly known as Brilab. In return, Hauser received the assistance of Justice Department

attorneys at his sentencing, substantial compensation, reimbursement of expenses, other fringe benefits during his participation in the investigation, and the benefits of the federal witness protection program.

The resulting Brilab investigation was supposed to be centered upon suspected illegal activities of labor union officials. Hauser and two F.B.I. agents, Mike Wacks and Larry Montague, established a bogus insurance agency known as Fidelity Financial Consultants in Beverly Hills, California, in mid-April, 1979. A cover was arranged whereby Fidelity would purport to represent Prudential Insurance Company. In reality, there was no such organization as Fidelity, and Fidelity had no connection with Prudential or any other insurance company. The plan was for Hauser, with the assistance of the

agents, to expose corruption among labor leaders by bribing them to acquire insurance for their unions through Fidelity.

After unsuccessful efforts in Southern California, Hauser expanded his field of operations to Texas. A previous acquaintance in Waco referred Hauser to Harold Grubbs in Houston. On July 5, 1979, Hauser met with Grubbs, and they concocted a plan to contact Defendant L. G. Moore, a labor leader, in order to obtain insurance business from Moore's labor unions. Although Moore had no prior criminal record, Grubbs described him as "on the take."[1] On September 20, a meeting was held between Moore, Hauser,

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[1]It is the admission into evidence of the tape recording of this conversation, together with a similar tape between Hauser and Grubbs, which is complained of as a violation of Moore's rights under the Confrontation Clause.

and Wacks. At this meeting, Moore was offered substantial inducements in exchange for procuring labor union insurance contracts. These "inducements", among other things, amounted to some six hundred thousand dollars per year in payment of commissions for the sale of an insurance policy to the State of Texas and promises of like renumeration for other such sales.

On October 17, Moore introduced Hauser, Wacks and Montague to co-defendant Garrett. Moore referred to Hauser and the agents as his friends and solicited Garrett's aid in obtaining insurance business for Prudential. After a discussion arose about the possibility of procuring a county contract, Hauser inquired about the insurance for the city of Houston. Garrett then called City of Houston Councilman Jim Westmoreland, and asked him whether a deal could be worked

out. Subsequently, Moore and Garrett attempted to "encourage" Westmoreland to accept Prudential's bid for the City of Houston's insurance contract.

Meanwhile, at the time of these discussions, the Houston City Council was negotiating and soliciting bids in preparation for the January, 1980 expiration of insurance coverage of 25,000 city employees. Without consulting the government agents posing as Prudential/Fidelity agents, Prudential Insurance Company had itself prepared a bid, as did at least four other major companies. The Texas Municipal League (the "League"), a commission representing over two hundred cities in Texas that sought to combine the bargaining power of the cities in order to obtain favorable insurance coverage for the municipalities, independently reviewed the insurance available and, coincidentally,

adopted Prudential's plan. The contract finally signed by the City Council on December 26, 1979 was with the League, which contracted with a Texas insurance company that in turn contracted with Prudential to provide the coverage. (It is clear that the League had nothing to do with the efforts to bribe Westmoreland, and that it had independently selected what it considered the best coverage at the lowest price.)

The next day, December 27, Moore called agent Wacks at the Fidelity offices in Beverly Hills, California.[2] Moore told Wacks that the contract was to be voted on <u>that</u> day (although Moore had been present at the council meeting the day <u>before</u>, at which the Council voted in

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[2]This is the interstate telephone call upon which the present federal Travel Act indictment is based.

favor of the Prudential contract), and that they needed an extra $10,000 to commit a couple more councilmen. Wacks agreed to pay this sum.

Moore called again the same day, left a message, and Wacks returned the call. Moore then told him that the contract had just been awarded at a premium of $12 million (of which the agreed commission for the agents and the defendants was ten percent).

ARGUMENT

(i) Should the indictment have been dismissed or an acquittal ordered because federal jurisdiction, which enabled the Government to prosecute Petitioner under the Travel Act, was furnished solely by behavior of undercover agents?

In Rewis v. United States, 401 U.S. 808, 91 S.Ct. 1056, 28 L.Ed. 2d 493 (1971), this Court held that the interstate commerce element giving rise

to federal jurisdiction under the Travel Act should be scrutinized so as to prevent such Act from altering sensitive federal-state relationships, overextending limited federal public resources, and transforming relatively minor state offenses into federal felonies. In so holding this Court recognized the tenuous nature of the interstate nexus and seemed to categorize situations where the interstate element was a "matter of happenstance" as those instances where jurisdiction cannot be supported under the Travel Act. Id., 401 U.S. at 812, 91 S.Ct. at 1059, 28 L.Ed. 2d at 493.

In United States v. Archer, 486 F.2d 670 (2d Cir. 1973), the Second Circuit, in adhering to Rewis, supra, recognized that when the federal element in a prosecution under the Travel Act is furnished solely by undercover agents, a stricter standard of review is needed

than when the interstate nexus is provided by the defendants themselves. This is so because the legislative purpose in instituting the Travel Act was not to extend federal power to deal with corruption in local prosecutor's offices merely as a result of fortuitous interstate contact between an undercover agent and corruptor. Id. at 685. Logically, if Rewis stands for the proposition that an expansive interpretation should not be given to the interstate nexus, then it is axiomatic that a similar narrow interpretation should be given when a Federal undercover agent plays a role in establishing Travel Act jurisdiction. The Second Circuit takes Rewis, justifiably, one step further by requiring a stricter standard in reviewing the federal element.

However, the Fifth Circuit (in contrast to the Second Circuit), has

adopted a more lax standard in scrutinizing the federal element giving rise to Travel Act jurisdiction. Thus a discrepancy exists as to the proper level of review concerning the interstate nexus invoking Travel Act jurisdiction. The Fifth Circuit in deciding the case at hand, has rejected the Archer "stricter standard" for testing the sufficiency of the interstate element when government agents are involved. Even though the Court stated that it does not expressly adopt or reject the Archer, "stricter standard", United States v. Garrett, 716 F.2d 257, 267 (5th Cir. 1983), in reality it rejects such standard. Rather than applying a stricter standard for testing the sufficiency of the interstate element, the Fifth Circuit merely scrutinizes the government's apparent reasons for its actions and forbids the government agent's movement out-of-state solely

to manufacture Travel Act jurisdiction. Id. at 267. Moreover, contrary to the Second Circuit, the Fifth Circuit interprets the Travel Act as not excepting "casual, incidental, or happenstance" interstate contacts. Id. at 267 n.5.

The interstate nexus, in which the Fifth Circuit found Travel Act jurisdiction, was predicated on an interstate telephone call made by Petitioner, who was in Texas, to federal undercover agent Wacks who was in California. In line with Fifth Circuit precedent, the Court found that since Agent Wacks did not fly out to California just to receive a telephone call from Petitioner Moore, coupled with the fact that Petitioner Moore was aware of Agent Wacks' California insurance company when he phoned Wacks, Travel Act jurisdiction existed. Id. at 267.

Yet, the Second Circuit, adopting an

Archer "stricter standard", would have inquired further than the Fifth Circuit. An apt illustration can be seen by comparing the scenario of Petitioner Moore's phone call with two of the telephone calls discussed in Archer. In the Paris call,[3] as in Petitioner's call, the federal agent traveled out-of-state for purposes other than manufacturing jurisdiction, a matter of happenstance. In Archer, the Second Circuit spoke directly to this point:

> "The Government places great weight on the fact that Bario (the agent) was in Paris on legitimate

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[3]In Archer, a federal agent had been working undercover in New York. During the pendency of his investigation in New York, he went to Paris, France on another investigation. While in Paris, the agent called a defendant in New York. The agent's call to New York was one of three out-of-state calls in which the Government sought to invoke Travel Act jurisdiction. United States v. Archer, supra at 673.

> business and was not sent there solely to manufacture jurisdiction in this case. But that fact alone is not sufficient to qualify the Paris call. Any such holding would permit the Government to convert any local bribery it had provoked into a federal offense by furnishing an out-of-state address for an undercover agent or sending him outside the state on a legitimate errand and having a call made before the offense was consumated." (Emphasis added is ours).

United States v. Archer, supra at 685.

Furthermore, in the Las Vegas call,[4] as in Petitioner's call, a defendant in-

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[4]While in New York, the undercover agent told a co-defendant, who was a bondsman, that he was from Las Vegas and that he was going out of town and could be reached at a certain Las Vegas hotel. The bondsman, in need of talking to the agent, repeatedly called the Las Vegas hotel. However, the bondsman never talked to the agent during his interstate calls because unbeknownst to the bondsman, the fact that the agent could be reached at the Las Vegas hotel was a government plant of misinformation.

itiated the phone call. The sole distinction being that Petitioner actually talked to the agent, while in Archer, the bondsman did not. Yet, based on this distinction, the Second Circuit would not have ruled differently. Id. at 682 n. 14. The Fifth Circuit argues that since Petitioner was aware of agent Wacks' California insurance company at the time of the phone call, jurisdiction exists. Meanwhile, the bondsman in Archer had the same subjective belief that the agent could be reached out-of-state and jurisdiction was still wanting.

Based on Archer, it is apparent that if Petitioner's appeal had been before the Second Circuit, the indictment would have been dismissed. The stricter standard applied by the Second Circuit is definitely a matter of line-drawing. Yet, the import of Archer is clear, the defendants must cause the interstate

commerce element; it cannot be manufactured by an undercover agent who gives a defendant an out-of-state telephone number and as a matter of happenstance travels to the location of the out-of-state telephone number and subsequently receives a call from the defendant. Especially where such phone call may have been made intrastate, but for the matter of happenstance.[5]

While such interstate nexus would have been given a stricter standard of scrutiny resulting in a dismissal of the indictment in the Second Circuit, the Fifth Circuit has refused to adopt such a standard. As a result, the Fifth Circuit has rendered a decision in conflict with

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[5]The Fifth Circuit believes that the Travel Act does not except "casual, incidental, or happenstance" interstate contacts. United States v. Garrett, supra at 257 n. 5.

the decision of the Second Circuit. The obvious need for this Court to grant certiorari and reconcile the two circuits becomes apparent upon reading a footnote written by Judge Tate which appears within his panel opinion of the instant case:

> "Further, in the author's personal view, the federalizing of the state bribery offense - itself spawned and created by governmental inducements of this nature and magnitude - is an unjustifiable expansion of the congressionally - intended reach of the Travel Act, especially where federal jurisdiction is founded upon a single interstate telephone call to a government agent (where the government had itself initiated the initial interstate contact with the Texas defendant). Again, however, I feel compelled by the precedents of this circuit to find Travel Act jurisdiction in the present case. (Emphasis added is ours).

United States v. Garrett, 716 F.2d 257,

275 n. 10 (5th Cir. 1983).

(ii) Whether the Government's conduct was so egregious in luring Petitioner to commit bribery that an acquittal should have been ordered on the grounds of Due Process?

In United States v. Russell, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed. 2d 366 (1973), this Honorable Court stated, "we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Petitioner asserts that the instant case is such a situation. Moreover, so does Judge Tate who wrote the panel opinion in United States v. Garrett, supra. In Garrett, Judge Tate states the following:

> "Although this conclusion seems required by precedent of this circuit, the

> author of this opinion, expressing views personal to him alone of the panel, insofar as he knows, feels obliged to note that, were he writing on a clean slate, he would feel that the defendants due process rights were violated by their conviction of government-created crimes spawned from an enterprise of this magnitude formed solely for the purpose of inducing individuals to commit crimes through inordinately large financial inductments, whatever the predisposition of the individuals so ensnared."

Id. at 275 n. 10.

In an attempt to lure Petitioner to bribe City of Houston Councilman Westmoreland to vote to accept Prudential's bid for the City of Houston insurance contract, undercover agents offered him the following: six hundred thousand dollars per year; admission of one of his sons into Georgetown Law School; and the opportunity of becoming the next General President of the International Union of

Operating Engineers. As a result of said inducements, at trial, Petitioner raised the defense of entrapment. Nevertheless, the jury, unable to reach a verdict on two counts, came back with a guilty verdict on count three, a substantive Travel Act violation.

Yet, the fact that the jury rejected Petitioner's entrapment defense should not preclude Petitioner from arguing that the government's conduct was so outrageous as to violate due process. Since the defense of entrapment was first recognized in Sorrells v. United States, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932) this Court has been split on whether the focus of the inquiry should be on defendant's predisposition or on the conduct of the government agent. United States v. Webster, 649 F.2d 346, 348 n. 3 (5th Cir. 1981). While some members of this Court seem to suggest

that outrageous government conduct can never be made a defense if a defendant is found to be predisposed to committing the criminal act, Hampton v. United States, 425 U.S 484, 492, 96 S.Ct. 1646, 1651, 48 L.Ed. 2d 113 (1976), other members disagree. Justices Powell and Blackmun, after noting that this Honorable Court has never had occassion to confront a Government overinvolvement case in an area outside the realm of contraband, both state that they are unwilling to conclude that such a due process argument can never be made if a defendant is found to be predisposed to committing the criminal act. Id. 425 U.S. at 493, 96 S.Ct. at 1651.

Furthermore, logic would suggest that the outrageousness of the government conduct should be considered as a defense even if a defendant is so predisposed. This is because the amount of Government

inducements begs the question as to whether an individual was predisposed to committing a criminal act. For instance, Mr. R. may be offered $100.00 to deface government property and refuse. Yet, Mr. R. may be offered $600,000.00 to deface the same property and agree. The fact that Mr. R. initially refuses to deface property for $100.00 seems to suggest that he is not predisposed to doing such an act. However, if Mr. R. would be willing to deface the same property for $600,000.00, there is some indication that there exists a certain price where he would be predisposed to committing such an act. It is illogical and against human nature to assume that most people are not predisposed to committing illegal acts when substantial inducements are at stake.

The jury, in rejecting Petitioner Moore's entrapment defense, arguably

believed that Moore was predisposed to committing bribery for a substantial sum. However, it was the substantial nature of the inducements which enticed Petitioner's ill motivated greed. Surely this Court should grant certiorari to decide whether substantial government inducements can be so unreasonable as to violate due process.

(iii) Whether the District Court violated Petitioner's rights under the Confrontation Clause in admitting inadmissible, tape-recorded, hearsay evidence?

At the trial, over proper objection, the Government was permitted to introduce the unsworn, surrepitiously tape recorded, hearsay statements of Harold Grubbs describing Petitioner Moore. The playing of these tapes, which consumed the major portion of a trial day, allowed the jury to hear numerous statements

similar to the following:

GRUBBS: "...Now this guy is the head of five states for the operating engineers. Got a lot of fucking members. Ah, and he can, he'll he'll deal."

GRUBBS: "Bottom line, he'll deal."

GRUBBS: "...Now this son of a bitch here you can deal with. One on one, just like you deal with me."

GRUBBS: "But, now this guy, L. G. Moore, I was telling you about, you can do business with him. Just like you're doing it with me and never have to worry about nothing."

GRUBBS: "But you see, you have to know these people and I know 'em, I know who's on the take and I know who's straight and I know all the whole fuckin' deal, and I'll tell you."

Before said tapes were introduced into evidence, counsel for Petitioner objected and stated that said tapes constituted inadmissible hearsay. Moreover, counsel told the District Judge that since declarant Grubbs was unavailable to testify, introduction of the tapes would violate Petitioner's Sixth Amendment

right of confrontation. On appeal the Fifth Circuit, in response to Petitioner's above said claims, ruled that the introduction of the aforementioned tapes constituted error in that they were inadmissible hearsay. United States v. Garrett, supra, at 273. However, they went on to state that such error was harmless.

Even though the Fifth Circuit panel recognized that Petitioner sought a reversal with respect to the Grubbs' tapes on the basis that his Sixth Amendment Confrontation rights were violated because Grubbs was unavailable for cross-examination, Id. 273, the panel decision failed to comment on this issue. Instead, their line of inquiry was limited to the hearsay nature of said tapes. In Dutton v. Evans, 400 U.S. 74, 86, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970), this Honorable Court stated that the

hearsay law is not to be "equated" with the right of confrontation. "The Sixth Amendment's right of an accused to confront the witnesses against him is ...a fundamental right...." Pointer v. Texas, 380 U.S. 400, 404 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965). A right which Petitioner was denied!

In addressing his Confrontation claim, Petitioner would note that the instant case is analogous to Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). There, this Court reversed the robbery conviction of a defendant where his involvement in the crime was explained by a Postal inspector who allegedly heard a co-defendant's oral confession. In Bruton, the declarant's statements were proof on an ultimate fact issue: involvement in the crime. Here, Grubbs' statements were proof on an ultimate fact

issue: predisposition to commit the crime. Thus, Petitioner like Bruton, was denied an opportunity to confront his accuser.

Nor can the denial of Petitioner's Confrontation rights be considered harmless error. In Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S.Ct. 229, 11 L.Ed. 2d 171 (1963) Chief Justice Warren stated:

> The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967), a decision similar to the case at bar both in the frequency of the highly prejudicial evidence, and its influence upon a "substantial right," the Court, in an opinion expressing the views of seven of its members wrote that it must be proven:

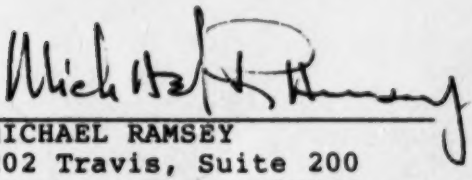
> ...beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. 386 U.S. at 24.

The fact that the jury deliberated for four days and was only able to reach a verdict on one of three counts demonstrates the closeness of the case. There can be little argument that the issue of whether Petitioner was "predisposed" to engage in his conduct was very difficult to resolve because the Government's proof on this issue was not strong. It is evident that the Chapman standard was not met. Therefore, this Court should grant certiorari and restore Petitioner's Sixth Amendment right of confrontation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three true and correct copies of the foregoing Petition for Certiorari for L. G. Moore were delivered by United States Mail to the Solicitor General, Department of Justice, Washington, D.C. 20530 (certified return receipt requested #P269 163 529); Mr. Ron Woods, Assistant United States Attorney at 515 Rusk, Houston, Texas 77002 (certified return receipt requested #P269 163 530); and to Mr. Richard Haynes, Attorney for John Garrett, at 2701 Fannin, Houston, Texas 77002 (certified return receipt requested #P269 163 531) on this the 19th day of January, 1984.

MICHAEL RAMSEY

Petitioner Moore adopts by reference, the Appendix of co-defendant John Garrett, who has also filed a Petition for writ of certiorari in the instant cause.

U. S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless a on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. §1952

Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to ---

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which Federal excise tax has not been paid, narcotics or controlled substances (as defined in sectioin 102(6) of

the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigation of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Office - Supreme Court, U.S
FILED
APR 9 1984
ALEXANDER L. STEVAS,
CLERK

Nos. 83-1226 and 83-1227

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN GARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

L.G. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' single interstate telephone call was sufficient to establish federal jurisdiction under the Travel Act, 18 U.S.C. 1952.

2. Whether police conduct in this case was so outrageous that it violated the Due Process Clause.

3. Whether any error in admitting two tape-recorded conversations against petitioner Moore was harmless beyond a reasonable doubt.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1226

JOHN GARRETT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-1227

L.G. MOORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a)[1] is reported at 716 F.2d 257. The order of the district court (Pet. App. 39a-41a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a) was entered on September 19, 1983. A petition for rehearing was denied on November 22, 1983 (Pet. App. 43a). The petitions

[1]References are to the appendix in No. 83-1226.

for a writ of certiorari were filed on January 21, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted of aiding and abetting each other in using a telephone to facilitate bribery, in violation of the Travel Act, 18 U.S.C. 1952 and 18 U.S.C. 2. They were each sentenced to five years' probation and a $10,000 fine.[2] The court of appeals affirmed (Pet. App. 1a-37a).

The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-9a). Briefly, it showed that in 1979 insurance broker Joseph Hauser pleaded guilty to federal charges of paying bribes and receiving kickbacks in connection with union insurance contracts. In return for a reduced sentence and financial support, Hauser agreed to cooperate with the government in investigating this type of crime. Accordingly, Hauser and two undercover FBI agents, Mike Wacks and Larry Montague, set up a fictitious insurance agency, through which they purported to represent the Prudential Insurance Company, and began negotiations with labor union leaders (*id.* at 3a-4a).[3]

In August 1979, petitioner Moore, a Texas union official, was introduced to Hauser by Harold Grubbs. Moore discussed his union connections in many states and indicated that insurance business for Texas school and hospital districts might be available. On September 10, Moore, Hauser, and Agent Wacks discussed potential commissions that Moore could make (a sum of $600,000 was mentioned), and Hauser paid Moore $2,000 up front (Pet. App. 5a).

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[2]The jury was unable to reach a verdict on another Travel Act count and one count of conspiracy.

[3]The resulting series of investigations has come to be called "Brilab."

Moore subsequently introduced Hauser to petitioner Garrett, the President of Richmond Road Engineering and a commissioner for the Port of Houston. Garrett called Jim Westmoreland, a Houston City Councilman, to ask him about obtaining the city employees' insurance contract that was going to come open for bidding. In exchange, Garrett wanted one half of the agents' commissions on the contract, which he would split with Moore (Pet. App. 6a). At a meeting two weeks later attended by Garrett, Moore, and the two agents, Garrett suggested that Westmoreland be paid $2,000 (*id.* at 7a). But later that night, Garrett told Agent Montague that Westmoreland should be paid only after the deal was signed (*id.* at 8a).

Coincidentally, the Prudential Insurance Company made a legitimate bid — unrelated to the undercover activity involving Hauser and the two agents — for the city employees' insurance contract. On December 26, the Houston City Council accepted Prudential's proposal (Pet. App. 6a-7a). At that council meeting, Westmoreland seconded the motion for adoption of the Prudential contract. The next day, Moore, in Garrett's presence, called Agent Wacks at Hauser's California office and told him that the contract was up for a vote that day. Moore also said that they needed $10,000 to pay off other councilmen. The undercover agent agreed to pay. Later that day, Moore told Agent Wacks that a $12 million contract had been awarded, of which 10% would be paid as a commission to petitioners and the agents (*id.* at 8a-9a).

On December 28, Moore again called Agent Wacks and requested $10,000 so that Garrett could pay Westmoreland. Nine days later the two agents met with petitioners and paid them $6,000 as their share of the first month's commissions. They also left $5,000 with Garrett for Westmoreland's payment. Subsequently, Moore told Agent Montague that

Garrett had given the money to Westmoreland, and Garrett then told Montague that Westmoreland wanted the additional $5,000 (Pet. App. 9a).

ARGUMENT

1. The jurisdictional predicate for petitioners' Travel Act convictions was the December 27, 1979, interstate telephone call placed at petitioner Garrett's request by petitioner Moore to Agent Wacks at the insurance company office in California. During the telephone conversation, Moore told Wacks that the vote on the insurance contract had been postponed by the city council and that $10,000 was needed to "move" a couple of the councilmen. Petitioner Garrett contends (Pet. 6-14) that this telephone call was insufficient to sustain federal jurisdiction because it did not facilitate unlawful activity and because it occurred after the completed state offense of bribery (even though the bribe money had not yet been paid).[4] In addition, both petitioners contend (Garrett Pet. 14-21; Moore Pet. 9-19) that federal jurisdiction was artificially created by the agents' use of the California office location. The court below correctly rejected these claims.

a. The Travel Act proscribes the use of interstate facilities to "facilitate" unlawful activities that are "thereafter" performed. 18 U.S.C. 1952(b)(2). Here, the telephone call from Moore to Agent Wacks unquestionably "facilitated" the bribery scheme. As the court of appeals explained (Pet. App. 16a), the "call to Wacks to obtain funds (which resulted in Wacks subsequently giving [petitioners] $10,000) actually benefited [petitioners'] plans to arrange payment for Westmoreland in accordance with their agreement to

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[4]Under Texas law, the crime of bribery was complete when petitioners agreed to pay Westmoreland for his vote. Tex. Penal Code Ann. § 36.02(a)(1) (Vernon Cum. Supp. 1984).

pay him for his vote." [5] The Travel Act does not require that the use of a facility in interstate commerce be a "substantial" or an "integral" part of the scheme; it requires only that such use contribute to the scheme in some way. See *United States* v. *Jones*, 642 F.2d 909, 913 (5th Cir. 1981); *United States* v. *LeFaivre*, 507 F.2d 1288, 1296-1297 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975); *United States* v. *Miller*, 379 F.2d 483, 486 (7th Cir.), cert. denied, 389 U.S. 930 (1967). That requirement was plainly satisfied here.[6]

Nor is there any merit to the claim that Moore's call was insufficient to sustain federal jurisdiction because it occurred after the completed state offense. To be sure, the Travel Act requires that illegal acts be performed *after* the use of a facility in interstate commerce. But that is precisely what happened here: the telephone call preceded the actual payment of the bribe to Westmoreland by more than three weeks (see Pet. App. 8a-9a). The fact that the state offense

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[5]Moore's call was sufficient to invoke Travel Act jurisdiction over Garrett since Garrett directed Moore to call the agents and was present during the call.

[6]The cases upon which petitioner Garrett relies all arose under facts sharply distinguishable from those here. For example, *United States* v. *Altobella*, 442 F.2d 310 (7th Cir. 1971), involved the cashing of a single out-of-state check representing the fruits of an extortion scheme. *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir.), cert. denied, 417 U.S. 976 (1974), involved the travel in interstate banking channels of three checks used to distribute the proceeds of an illegal bribery scheme. In *United States* v. *Lightfoot*, 506 F.2d 238 (D.C. Cir. 1974), federal jurisdiction was asserted on the basis of the defendant's interstate purchase of an automobile with funds derived from prostitution. And in *United States* v. *O'Dell*, 671 F.2d 191 (6th Cir. 1982), the claimed basis for federal jurisdiction was defendants' placement of advertisements for their massage parlors in local newspapers, some copies of which were sent out of state. Here, by contrast, the telephone communication was with the out-of-state insurance agency that was the intended beneficiary of the contract that was the subject of the bribe, and the purpose of the call was to obtain the bribe money.

was technically complete when the bribe was offered is irrelevant; the actual payment of the bribe was itself illegal under Texas Law (Tex. Penal Code Ann. § 36.02(a)(1) (Vernon Cum. Supp. 1984)) and was an intrinsic part of the ongoing bribery scheme. See *Perrin* v. *United States*, 580 F.2d 730 (5th Cir. 1978), aff'd, 444 U.S. 37 (1979) (defendants had already offered to bribe the employee, an offense under state law, but used the interstate call to exploit the stolen data in order to pay the bribe); *United States* v. *Eisner*, 533 F.2d 987, 993 (6th Cir.), cert. denied, 429 U.S. 919 (1976); *United States* v. *LeFaivre*, 507 F.2d at 1291.[7]

b. In arguing that the agents artificially created federal jurisdiction by locating their fictitious insurance agency in California, petitioners rely entirely on *United States* v. *Archer*, 486 F.2d 670, 685-686 (2d Cir. 1973). In *Archer*, the court of appeals rejected the invocation of Travel Act jurisdiction on the basis of several interstate and foreign telephone calls. One of the calls was made by a government agent who travelled to New Jersey solely in order to make an interstate call to the defendants in New York, which the defendants then returned. *Id.* at 681. A second call was made by the defendants to Las Vegas in response to a government plant of misinformation that the agent could be reached there. *Id.* at 682. And the final call was placed by the agent to the defendants while the agent was pursuing another government investigation in Paris. *Id.* at 682-683. On rehearing in *Archer* the court explained (*id.* at 685-686

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[7]Petitioner Garrett also argues that there was no federal jurisdiction here because "[t]his was an essentially local scheme to bribe a local city councilman" (Pet. 13). But in *Perrin* v. *United States*, 444 U.S. at 50, this Court indicated that "so long as the requisite interstate nexus is present, the [Travel Act] reflects a clear and deliberate intent on the part of Congress to alter the federal-state balance in order to reinforce state law enforcement." Thus, as the court below concluded (Pet. App. 13a), "bribery of a city official * * * is clearly within the ambit of the statute."

(emphasis added)) that it had gone "no further than to hold that when the federal element in a prosecution under the Travel Act is furnished *solely* by undercover agents, a stricter standard is applicable than when the interstate or foreign activities are those of the defendants themselves."

In the instant case, federal jurisdiction was not " 'furnished *solely* by [the] undercover agents' " (Pet. App. 19a). Accordingly, the court of appeals was correct (*ibid.*) that it had no need either to "adopt or reject" the *Archer* standard. Even under the *Archer* approach, the interstate nexus here was sufficient to support federal jurisdiction.

The December 27 telephone call was not contrived by the government but made by defendants on their own initiative. Indeed, since the intent of petitioners' bribery scheme was to procure business for an out-of-state insurance agency that was providing the wherewithal for the scheme, it was natural and perhaps inevitable that interstate facilities of communication would be used. Moreover, as the court of appeals observed (Pet. App. 19a), "no evidence shows that the agents initially set up [their fictitious insurance business] in California or arranged to be there when [petitioners] needed to telephone them for additional funds solely for the purpose of contriving an interstate nexus." Rather, "[t]he agents had established a base in California because of Hauser's connections there and, subsequently, decided to branch out-of-state from California into Louisiana and Texas because their activities in California were impaired by publicity that Hauser was a government informer" (*ibid.*). Based on the preexisting out-of-state operation, as well as petitioners' knowledge of the interstate nature of the agents' insurance business, the court of appeals correctly concluded (*id.* at 20a) that the interstate nexus was not "artificially created to invoke federal jurisdiction." See *United States* v. *Bagnariol*, 665 F.2d 877, 896-899 (9th Cir. 1981). This factual determination does not warrant further review.

2. Relying on the concurring and dissenting opinions in *Hampton* v. *United States*, 425 U.S. 484 (1976), petitioners contend (Garrett Pet. 21-29; Moore Pet. 19-24) that the federal agents' activities were so "outrageous" as to violate due process. Even assuming the validity of the general legal standard petitioners assert (but see *Hampton*, 425 U.S. at 488-490 (plurality opinion)), their claim is entirely without merit on the facts of this case.

Essentially, petitioners claim that the agents' conduct was outrageous in three respects. First, petitioner Garrett asserts (Pet. 26) that the degree of government involvement in the bribery scheme was outrageous, arguing that, but for the agents' participation, petitioners would have been incapable of committing the bribery. However, the evidence showed that the government merely provided petitioners with the opportunity and facilities for committing an offense, which petitioners willingly and actively exploited for their own gain. As this Court observed in *Sorrells* v. *United States*, 287 U.S. 435, 441 (1932), "[i]t is well settled that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution." The government's involvement here was certainly no greater than that sanctioned by the Court in *Hampton*, where "the drug which the Government informant allegedly supplied to petitioner both was illegal and constituted the *corpus delicti* for the sale of which the petitioner was convicted" (425 U.S. at 489), or in *United States* v. *Russell*, 411 U.S. 423, 427 (1973), where the undercover agent provided "a scarce ingredient essential for the manufacture of [the illegal drug]." [8]

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[8]Petitioner Garrett's reliance on *United States* v. *Twigg*, 588 F.2d 373 (3d Cir. 1978), is inapposite. There, the government informant was "completely in charge of the entire laboratory" used for the illegal operation. *Id.* at 376.

Second, petitioner Garrett argues (Pet. 28-29) that the agents' conduct was outrageous because they "allowed the city council to vote (and, indeed, sign a contract) knowing that some of the votes were the product of the efforts of the federal government and not the product of a legitimate desire to promote the welfare of the city." But even assuming that the agents' conduct in this respect was outrageous,[9] "the fact remains that '[t]he limitations of the Due Process Clause * * * come into play only when the Government activity in question violates some protected right of the *defendant*.' " *United States* v. *Payner*, 447 U.S. 727, 737 n.9 (1980) (quoting *Hampton* v. *United States*, 425 U.S. at 490 (plurality opinion)). Here, petitioner Garrett's own rights clearly were not affected by the conduct to which he objects. See *United States* v. *Jannotti*, 673 F.2d 578, 610 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982).

Finally, despite the jury's rejection of his entrapment defense, petitioner Moore asserts (Pet. 20-24) that the agents' conduct was outrageous in view of the degree of government inducement in this case, including an offer to him of $600,000. To be sure, a majority of this Court in *Hampton* indicated that a finding of no entrapment does not necessarily preclude the availability of a due process defense. But where, as here, "the extent of government inducement necessarily was considered by the factfinder in its rejection of the entrapment defense * * * a successful due

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[9]It is clear that the Prudential bid would have been accepted by the city council regardless of the Westmoreland bribe, since all but one or two of the nine councilmen voted for it (Tr. 37, 103, 199) and no other councilmen were offered bribes (Tr. 37, 206-252). In fact, the Texas Municipal League, a commission representing over 200 cities in Texas that sought to combine the bargaining power of the cities in order to obtain favorable insurance coverage, independently reviewed the insurance available and selected Prudential's plan as providing the best coverage at the lowest price (Pet. App. 7a).

process defense must be predicated on other grounds." *United States* v. *Jannotti*, 673 F.2d at 608.

Petitioners' due process claim was considered by the court of appeals and rejected on the facts of this case. See Pet. App. 35a-37a. Further review by this Court of this fact-bound issue is not warranted.

3. At trial, the government sought to introduce two taped conversations between Harold Grubbs and Joseph Hauser containing assertions that petitioner Moore would be a likely candidate to help Hauser obtain insurance business and describing Moore as someone who would "deal." Over Moore's objection that the conversations were inadmissible hearsay and that their admission would violate his right of confrontation because Grubbs was unavailable to testify, the district court allowed the evidence for the sole purpose of showing why Hauser approached Moore (Tr. 24, 67-68). While expressing doubt that the taped conversations were properly admissible for that purpose, the court of appeals concluded that any error in admitting the conversations was harmless (Pet. App. 32a). Petitioner Moore challenges this ruling (Pet. 24-29).

In particular, Moore argues that, in applying the harmless error doctrine, the court failed to consider his contention that the admission of the conversations violated not only the rule against hearsay but his constitutional right of confrontation as well. However, the court's discussion of this issue plainly reflects its awareness of Moore's claim "that his Sixth Amendment confrontation rights were violated because Grubbs was unavailable for cross-examination with respect to the allegedly hearsay statements" (Pet. App. 31a). And although the court's "doubt" about the admissibility of the evidence appears to have rested solely on the nonconstitutional basis of Fed. R. Evid. 403 (see Pet. App. 32a), there is in the opinion no suggestion that the court was applying the somewhat more relaxed standard of harmless error appropriate for nonconstitutional claims.

Indeed, the standard of harmlessness beyond a reasonable doubt was clearly satisfied in this case. The district court expressly cautioned the jury that it should not "hold against [petitioners], in any way, the fact that this other man, Mr. Grubbs, whom you will not see here, said some bad things about Mr. Moore" and that "[f]or all you know, Harold Grubbs was absolutely making up every word he said about L.G. Moore" (Tr. 24). Moreover, evidence adduced after the admission of the Grubbs-Hauser conversations, primarily in the form of tape-recorded conversations between Moore, Garrett, and the government agents, "showed that Moore readily and immediately joined the insurance scheme and was active at every stage of the events" (Pet. App. 33a). As the court of appeals concluded (*ibid.*), "[c]onsidering the entire record, * * * Grubbs' references to Moore in the tapes, which the jury was repeatedly cautioned by the district court not to credit for their truth, [did not] cause[] prejudice to any appreciable degree to Moore's entrapment defense." The court of appeals' application of the harmless error standard to this set of facts does not raise an issue warranting this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

DOJ-1984-04